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Author/s:

Rosser, A;Macdonald, K;Setiawan, KMP

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Implementing the United Nations Guiding Principles on Business and Human Rights: Insights from Indonesia

Andrew Rosser,* Kate Macdonald** & Ken M.P. Setiawan***

ABSTRACT

Following the endorsement of the United Nations Guiding Principles for Business and Human Rights (UNGPs) in 2011, attention has shifted towards challenges of implementation. Through detailed analysis of the case of Indonesia, this article analyses the conditions under which implementation occurs and explores strategies for strengthened implementation. While UNGP implementation has often been argued to depend on strong collaborative learning networks, we demonstrate instead that power balances between rights coalitions and politico-business and technocratic elites have proved decisive—implementation varying across sectors and over time depending on configurations of market power, histories of rights struggles, and patterns of high-level political support.

I. INTRODUCTION

Business activity remains an important driver of the global economy. At the same time, such business activity has often been associated with significant human rights risks, such as forced displacement of indigenous people from their traditional land, violations of internationally recognized labor rights, and environmental impacts that jeopardize the health and livelihoods of local populations.¹ In response, an elaborate system of global governance seeking to regulate the human rights impacts of business activity has emerged. A central element of this response has been development of the United Nations Guiding Principles for Business and Human Rights (UNGPs). These global norms have been described as “the single most important innovation in the human rights and business field in the last 25 years.”²

Since their unanimous endorsement by the United Nations (UN) Human Rights Council (HRC) in 2011, the UNGPs have occupied a central position within the multi-level system of global governance through which the human rights impact of business is regulated—establishing a new set of global regulatory norms on corporate activity and human rights. The UNGPs declare that states have a duty to protect people against human rights abuses including by businesses; businesses have a responsibility to respect the human rights of others; and both have an obligation to ensure that victims of human rights abuses have access to effective remedies.³ This “protect, respect, and remedy” framework represents a departure from the previously dominant notion of corporate social responsibility (CSR) and associated United Nations initiatives such as the Global Compact, which leave it up to companies to voluntarily determine how to behave in a socially responsible manner.⁴ In particular, as legal scholar Anita Ramasastry has pointed out, this framework differs from CSR in its aim of “(1) a universal human rights yardstick for all business concerns, (2) a renewed emphasis [on] a proactive role for the state, and (3) enhanced access to remedy for victims of human rights abuses linked to corporate conduct.”⁵

Since formal endorsement of the UNGPs, the UN has moved to promote implementation across the globe—spearheaded by an inter-regional working group of experts tasked with promotion, dissemination, and implementation of the UNGPs, particularly in jurisdictions and sectors known for systemic risks of human rights violations by transnational corporations and other business enterprises.⁶ Implementation of the UNGPs has been documented in a range of forms, including incorporation into norms and guidelines propagated by international standard-setting bodies; enactment of new country-level laws, regulations, policies, guidelines and plans on business and human rights (BHR); introduction into initiatives to elaborate human rights standards and commitments in specific industries; incorporation into company policies and

practices; and use by civil society and worker organizations as an advocacy and accountability tool.⁷ Yet overall, studies suggest that UNGP implementation has been limited. For instance, a 2016 study by the European Parliament’s Directorate-General for External Policies found that there had been limited take up of the UNGPs in most parts of the world outside the European Union (EU), particularly in the form of government adoption of national action plans for BHR (NAPs).⁸ Since then a few countries outside the EU have adopted NAPs but the overall number of countries with NAPs remains modest.⁹ At the same time, scholars of BHR have expressed concerns that NAPs are often shallow in terms of content and their provisions poorly implemented, even in EU countries.¹⁰ Furthermore, the Corporate Human Rights Benchmark (2020) found that only a minority of 230 global companies made human rights disclosures demonstrating a “willingness and commitment to take human rights seriously,”¹¹ imperiling progress towards achievement of the rights-focused Sustainable Development Goals (SDGs) by 2030.

Why has UNGP implementation been so limited? What explains the instances where it has happened and the forms it has taken? And what can be done to improve the extent of UNGP implementation? This article seeks to shed light on these questions by exploring pathways and obstacles to UNGP implementation with reference to the case of Indonesia, a country with a long history of corporate abuses of human rights and one which has made some limited progress in implementing the UNGPs. The theory of change underpinning the UNGPs emphasizes the role of socialization through elite-based collaborative learning networks in promoting UNGP implementation. As such, it implies that the principal obstacle to UNGP implementation is the absence or weakness of such networks, and that there is a consequent need to build such networks through awareness-raising, training, and capacity-building exercises.

By contrast, drawing on critiques of the UNGP framework that emphasize the role of power relations and contestation in shaping UNGP implementation, we argue that the primary obstacle to UNGP implementation in Indonesia has been power asymmetries between politico-business and technocratic elites, on the one hand, and rights coalitions, on the other. At the same time, we show that the latter have been able to make some headway in promoting UNGP implementation where they have leveraged market forces in their favor. This has served to narrow these power asymmetries, albeit with different effects on the form of implementation depending on the history of struggle over business and human rights in the relevant domain and the extent of high-level political support. In terms of strategy for promoting UNGP implementation, we thus argue that Indonesia's experience suggests that efforts to promote UNGP implementation need to go beyond measures of socialization and learning to focus on enabling rights coalitions to confront corporate power. This includes supporting the monitoring and mobilizational capacities of these coalitions over time and, to the extent that hard law responses by states are considered desirable, facilitating their ability to forge alliances with sympathetic elements in the state apparatus.

In presenting this argument, we begin by outlining our approach to understanding both the drivers of and constraints to UNGP implementation. We then use this approach to explore the Indonesian case. We conclude the article by considering the lessons of the Indonesian experience of contested UNGP implementation both for practical efforts to promote UNGP implementation, and for wider theoretical debates about the limitations of soft law approaches such as the UNGPs as instruments for protecting human rights.

II. THEORIZING UNGP IMPLEMENTATION

The intellectual foundations of the UNGP framework—including its theory of change—were decisively shaped by the framework’s central architect, John Ruggie. Ruggie is a prominent constructivist international relations scholar who served as UN Special Representative for Business and Human Rights for the six-year period from 2005-2011 during which the UNGPs were developed. The framework took as its central starting point a critique of what Ruggie described as a “juridical paradigm” of implementation.¹² This paradigm mainly focuses on the negotiation of international human rights treaties, followed by juridical approaches to domestic implementation or compliance with these international legal commitments. Ruggie was particularly critical of assumptions built into such a model regarding “a rights-based hierarchy,”¹³ whereby human rights law is viewed as trumping other fields of corporate, investment or trade law where these come into legal and moral conflict. Instead, he emphasized trends in international legalization in recent decades towards “the fragmentation of international law into specialised and autonomous spheres.”¹⁴ He also questioned assumptions about the causal processes through which international human rights commitments are assumed in such a model to lead to domestic implementation. Instead, he pointed to a wide body of empirical evidence on state implementation of human rights law suggesting that comprehensive efforts to transform business practice through state-centric and hierarchical international human rights treaties are likely to be “least effective in the case of those countries where they are needed most.”¹⁵ In place of a juridical, state-centred approach, Ruggie¹⁶ advocated “a model of widely distributed efforts and cumulative change” in which recognition of and behavioral responses to human rights norms was understood as being driven not only by legal or proto-legal commands but also by “social logics and processes other than law.”¹⁷

Ruggie’s account of this pragmatist and cumulative approach to pursuing dissemination

and implementation of international human rights norms through the UNGPs is multi-faceted and partly implicit—with articulation of key assumptions and claims spread across a number of texts developed by Ruggie and his collaborators over the period of almost a decade. The central causal pathway to implementation emphasized by Ruggie’s writings on the UNGPs and associated processes of transnational business regulation focuses on processes of socialization and learning via collaborative networks, within which “powerful actors, such as states and businesses, are acculturated into new understandings of socially appropriate behaviour.”¹⁸ As Tara Melish and Errol Meidinger have highlighted, this emphasis was in keeping with Ruggie’s broader social constructivist theoretical orientation as an international relations scholar¹⁹—an approach that focuses on “the proliferation of global norms or shared cultural understandings” which “ultimately become embedded in human consciousness where they construct the interests and identities” of key corporate, state, and civil society actors through setting expectations and framing how people understand problems and appropriate responses.²⁰

The constructivist underpinnings of such an account resonate strongly with broader scholarship on norm diffusion and transnational legal change, which has often highlighted complex socialization processes involving strategic bargaining, moral consciousness-raising and persuasion, complex learning and associated processes of habitualization and institutional change.²¹ Such causal mechanisms were then conceptualized as operating centrally through collaborative learning networks, which Ruggie saw as providing a social infrastructure through which communities of practice could emerge or solidify, and within which people could come together to develop a common understanding of business and human rights problems, and build knowledge about potential responses. This focus on collaborative learning networks draws on and resonates with wider theories of networked or polycentric global governance, which are

often linked to an understanding of global regulatory systems as catalysts and enablers for broader systems of networked learning.²² While Ruggie's central theoretical focus was on implementation pathways based on socialization and learning within collaborative governance networks, there are also a range of places in his writing where he explicitly recognizes the significance of social mobilization, advocacy and accountability processes as drivers of UNGP implementation.²³ Such an account of pathways of implementation places more central emphasis on causal drivers of implementation based in power struggles between competing coalitions of social actors and interests, and correspondingly, on the central role of civil society actors in promoting processes of social accountability in support of UNGP implementation. But as the UNGP framework evolved and accounts of the roles and responsibilities of business and government were elaborated in greater depth, Ruggie's account of the role of civil society mobilization and advocacy within the UNGP implementation process remained relatively underdeveloped.

This has attracted criticism from critical governance theorists such as Rodríguez- César Garavito²⁴ and Melish and Meidinger.²⁵ The UNGP framework, they have argued, tends to portray UNGP implementation as a depoliticized process of engagement between generic "stakeholders" seeking to learn from or adjust culturally to one another.²⁶ Moreover, it implies that the principal obstacle to UNGP implementation is the absence or weakness of such networks rather than other political phenomena such as power relations. The conceptual problems this causes are perhaps most apparent in official accounts of UNGP implementation informed by the UNGP framework such as the European Parliament's Directorate-General for External Policies' report on UNGP implementation across the globe.²⁷ While this report identifies a range of obstacles to UNGP implementation including corruption and a concern by states not to deter

foreign investment, it emphasizes the causal effect of factors such as a lack of awareness about the UNGPs and weak expert capacity.²⁸ Furthermore, in proposing measures to promote UNGP implementation, it focuses on socialization and learning-related measures—awareness-raising, capacity building activities, business and human rights events, and technical assistance and training—reinforcing the notion that these are of greater causal significance. As Melish and Meidinger have noted, this focus on socialization and learning has obscured the role of power relations and contestation in shaping UNGP implementation.²⁹ Instead, they suggest, we need a theoretical understanding of how social change is effectuated that recognizes “very real power asymmetries that characterise human rights struggles,” the way that they “function in practice to substantially inhibit, limit or even preclude community-based civil society engagement in monitoring and accountability processes,” and the conditions under which less powerful actors can “narrow power asymmetries” sufficiently to promote change.³⁰

These central propositions about the importance of power struggles between competing coalitions of interest in shaping pathways of implementation resonate strongly with broader political, sociological and political economy traditions of analyzing the importance of rights coalitions in promoting legal and policy change.³¹ Such approaches have highlighted the ways social movements can sometimes “use the ratification of international human rights treaties to draw attention to abuse of rights and to leverage policy reform from governments,” raising the expectations of advocacy organizations or rights activists in ways that bolster rights demands,³² and catalyzing the emergence and mobilization of social movements towards social reform.³³ Similarly, critical political economy perspectives on human rights have highlighted the ways in which human rights norms can be appropriated as political tools to support particular interest-based coalitions, suggesting the importance of analyzing the “material interests at stake” for key

actors, “the nature of these interests, the way these interests shape . . . actors’ policy stances, and the respective abilities of different actors to influence the policy-making process by virtue of their structural or instrumental leverage.”³⁴ Such a lens resonates also with scholarship on business regulation and corporate accountability that has highlighted bottom-up regulatory processes that embrace explicit aims “to redistribute power, control, and resources to marginalized actors”³⁵ through institutional and policy change, transformations within market relations, and changes to social and political networks through which civil society organizations can “advocat[e] for their interests on the global stage.”³⁶ On this view, regulatory change demands broad-based processes of social contestation and power struggle, through which grassroots mobilization and societal pressure on elites can reshape power relations within contested regulatory fields.³⁷

In this article we adopt this critical approach and extend it in two ways, both of which speak to our concern to understand the form that UNGP implementation takes when it occurs. First, we consider the role of political leadership. In the field of comparative politics, there is a long tradition of exploring how political leaders and their calculations shape political and economic outcomes in and across specific national contexts.³⁸ In the business and human rights context, Ruggie has emphasized the role of steering or orchestration across multiple actors and networks, suggesting this is “at the heart of the GPs implementation strategy.”³⁹ From our point of view, the important thing about political leadership is what it means in terms of how UNGP implementation materializes when power asymmetries have been sufficiently narrowed for change to be possible. Put simply, where political leaders are sympathetic to rights causes for whatever reason, it opens up the possibility of rights coalitions operating through the state apparatus to achieve change—in other words, to promote regulatory responses imposing binding

commitments on government and business to protect or respect human rights; where political leaders are not sympathetic it closes off this possibility. Political leaders can facilitate regulatory responses by creating new spaces in which marginalized elements are able to participate in policy-making, changing the terms of engagement in policy-making between these elements, and connecting human rights concerns to other, more powerful, governmental agendas. Alternatively, they can block these forms of inclusion. In this respect, political leaders can act either as change agents or agents for the preservation of the status quo.⁴⁰

Second, we consider the temporal or historical dimension of change. The point here is that the UNGPs have entered into contexts defined by distinct histories of struggle over issues to do with business and human rights, and distinct institutional structures for addressing these issues. The resulting variation in the stages of struggle and institutional arrangements related to BHR exists not only across countries but also across sectors, reflecting the fact that social movements related to human rights concerns and resulting institutional innovations have evolved in some industries earlier than in others for a variety of historically specific reasons. UNGP implementation can consequently produce markedly different outcomes in terms of form of implementation—for instance, whether it occurs through voluntary certification initiatives, voluntary company initiatives, state direction or other mechanisms—depending on how it intersects with the stage and products of these struggles. Early waves of work on global norm diffusion envisaged relatively linear processes of progressive and cumulative change, although many now recognize that such processes are often messy and contested, with “co-optation, drift, accretion and reversal of a norm—including disputes over whether it is a norm at all—[being] constant possibilities.”⁴¹ One element of this messiness and lack of certainty about outcomes is variation in the starting point of the associated struggles.

In the following sections, we employ this approach to analyze the Indonesian case. We begin by providing an overview of Indonesia's implementation of the UNGPs through both governmental and nongovernmental processes.

III. UNGP IMPLEMENTATION IN INDONESIA

Indonesia's engagement with the UNGPs goes back to their inception. The country has held a seat on the United Nations Human Rights Council for much of the period since the Council's establishment in 2006.⁴² In this capacity, it played a role in overseeing the production of the UNGPs, although it was not on the Council at the time the latter endorsed the UNGPs in 2011. Perhaps for this reason, the Indonesian government initially voiced strong support for the UNGPs. For instance, the UN Working Group on Business and Human Rights has "strongly encourage[d] all States to develop, enact and update a national action plan on business and human rights as part of the State responsibility to disseminate and implement the [UNGPs]."⁴³ The Indonesian government's initial response to this appeal, conveyed at a meeting of the United Nations HRC in 2011, was to note that NAPs are one of the "basic foundations for the effective and comprehensive implementation of the Guiding Principles" and to express a commitment to developing such a plan.⁴⁴ Yet, the government moved slowly in this direction.

In 2018, it instructed the Ministry of Foreign Affairs to prepare and disseminate "guidelines" for BHR, including a direction to this effect in Presidential Regulation 33/2018 on an Amendment to Presidential Regulation 75/2015 on a National Human Rights Plan for 2015-2019. In December 2018, Prabianto Mukti Wibowo, an Assistant Deputy at the Coordinating Ministry of Economic Affairs, announced that, in its capacity as the government's focal point for

BHR, his Ministry had issued a set of ten recommendations to the government as part of its work on a “roadmap” for BHR following multi-stakeholder discussions. Entitled the Bogor Outcome Declaration, these recommendations included that the government should guide awareness-raising efforts on BHR among all relevant stakeholders and make a policy commitment to either develop a NAP or incorporate a dedicated chapter on BHR in the national action plan for human rights (HR-NAP).⁴⁵ By the end of 2020, however, neither the Ministry of Foreign Affairs’ work on guidelines nor the Coordinating Ministry of Economic Affairs’ work on a roadmap had yielded a NAP or a dedicated chapter in the HR-NAP. The government reportedly launched a draft NAP in November 2020 but a final version has not materialized.⁴⁶ At the same time, the incorporation of the UNGPs into the HR-NAP, which was proceeding under the tutelage of the Ministry of Law and Human Rights, the ministry responsible for overseeing development of the HR-NAP, was progressing slowly and in a limited way. It seemed likely that BHR would feature in the 2020-2024 HR-NAP as a non-priority area.⁴⁷ Rights activists welcomed this outcome but viewed it as a second-best outcome compared to issuance of a NAP and, in particular, one underpinned by a high-level regulation giving it binding status.⁴⁸

At the same time, the government had done little by the end of 2020 to incorporate the UNGPs into regulatory frameworks at the sectoral level, particularly in sectors prone to human rights abuses. In the palm oil sector, for instance, it flatly rejected calls from rights coalitions to incorporate stronger human rights standards based on the UNGPs into the Indonesia Sustainable Palm Oil (ISPO) scheme, the country’s official palm oil sustainability standard. Informed in part by the UNGPs, rights coalitions had demanded that the government incorporate human rights protections into the ISPO when it initiated a process of review and revision in 2016. However, the extensive multi-stakeholder consultations on the standard revisions that had initially been

promised did not eventuate, and it later emerged that planned human rights principles had been removed from the draft. Revisions to the ISPO principles were finalized in 2020 without incorporation of proposed human rights protections.

Likewise, in the fisheries sector, the government balked at proceeding with measures aimed at addressing concerns about slavery and other labor abuses in the fishing industry. Between 2015 and 2018, then Minister for Maritime Affairs and Fisheries Susi Pudjiastuti signed four regulations pertaining to business and human rights standards that introduced mandatory requirements for businesses to undergo a human rights certification process. Part of her controversial efforts to combat illegal fishing in Indonesia, these regulations were drafted with the assistance of the Association for International Human Rights Reporting Standards (FIHRRST), a local NGO that has been active in the BHR field. According to Bachtiar Manurung, FIHRRST's Director for Operations, the UNGPs were a key influence in its collaboration with the Ministry of Maritime Affairs and Fisheries (MMAF).⁴⁹ Following the appointment of a new minister in 2019, however, implementation of this scheme appeared to stall. The new minister, Edhy Prabowo, an ally of Prabowo Subianto, a former army general with a record of committing serious human rights abuses and President Joko Widodo's main political rival, indicated he would backtrack on many of Pudjiastuti's reforms in favor of a softer approach to deterring illegal fishing.⁵⁰ To this effect, he drew up a list of regulations for review in light of the Jokowi government's emphasis on deregulation and feedback from industry stakeholders.⁵¹ Among the regulations slated for potential revision or cancellation were two that underpinned Pudjiastuti's human rights certification scheme.

Finally, Indonesia's response to the UNGPs at the voluntary/corporate level was patchy. A study of corporate disclosure of BHR matters within ASEAN⁵² found that only a few of the

country's "top" publicly listed companies had incorporated the UNGPs into their corporate policies or otherwise made human rights disclosures consistent with UNGP benchmarks. Similarly, Ahsinin et al.⁵³ found that voluntary incorporation of the UNGPs into company policies and practices was limited mainly to companies exposed to human rights-related business risks by virtue of the fact that they export to the US and Europe. In a study of respect for human rights among Indonesia's top 100 listed companies, FIHRRST found that "the vast majority of the assessed companies lack an adequate human rights management system consistent with the requirements of the UN Guiding Principles, plus have a gap in addressing some major human rights issues."⁵⁴ In 2011, FIHRRST developed an auditable standards and certification process for companies that was based on the UNGPs. But so far, few companies appear to have sought this certification.⁵⁵ Perhaps the only significant exception to this pattern has been the palm oil sector where elements of the UNGPs have been incorporated into the requirements of the Roundtable on Sustainable Palm Oil (RSPO), a voluntary multi-stakeholder governance scheme that sets social and environmental standards for business activity in the palm oil sector, and certifies companies against these standards. Although international in scope, the RSPO has a particular association with Indonesia and neighboring Malaysia given the scale of their respective palm oil industries.

One important respect in which the UNGPs have been incorporated into the RSPO is through the inclusion of human rights standards in the RSPO's Principles and Criteria (P&C)—a set of sustainable production standards that apply to certified production facilities. In 2012, shortly after international endorsement of the UNGPs, the RSPO formed a Task Force to review its P&C. As a result of this process, new criteria were added in April 2013, including introduction of a new human rights standard (Criterion 6.13). A new RSPO Working Group on

Human Rights was subsequently formed to oversee the implementation of human rights Principles and Criteria, and generate associated guidance to inform the RSPO's human rights policies. Significant efforts to implement the UNGPs also occurred within the RSPO complaints system, incorporating provisions to align this system with the UN Guiding Principles, particularly Principle 31 on the effectiveness of non-judicial grievance mechanisms.⁵⁶

Why has UNGP implementation in Indonesia been so limited? And what explains the few instances where it seems to have occurred—such as MMAF's introduction of a mandatory human rights certification scheme based on the UNGPs and the incorporation of the UNGPs into the RSPO—and the forms of implementation in both cases? We consider these questions in the following section.

A. Explaining UNGP Implementation in Indonesia

1. Limited Implementation

It is difficult to explain the limited implementation of the UNGPs in Indonesia solely in terms of problems of socialization and learning. Since the endorsement of the UNGPs by the HRC in 2011, Komnas HAM, Indonesia's national human rights institution (NHRI), and its NGO allies have engaged in a sustained campaign to promote awareness of the UNGPs and call for their implementation. Komnas HAM organized seminars on the relationship between corporate practices and human rights as early as 2006. These highlighted that CSR practices—which had become increasingly popular among Indonesia's major conglomerates over the previous decade⁵⁷—emphasized the charitable endeavors of companies rather than the human rights

impact of corporate activity. After 2011, Komnas HAM developed an explicit focus on the UNGPs, appointing a special rapporteur for BHR in 2013. Around the same time, several NGOs, most notably the Institute for Policy Research and Advocacy (ELSAM), the International Forum on Indonesian Development (INFID), and FIHRRST took up BHR as part of their respective programs. Working together, Komnas HAM and ELSAM ran a number of workshops on BHR over the coming years that were attended by multinational companies and state-owned enterprises (BUMN) from the plantation and mining industries.⁵⁸ They also held consultations and focus group discussions with other stakeholders and/or relevant organizations, including UNICEF and various government agencies.⁵⁹ Figures associated with Komnas HAM, ELSAM, INFID FIHRRST, and other NGOs also published a succession of reports and op-ed pieces on BHR/the UNGPs,⁶⁰ provided commentary to media outlets on matters related to BHR and the UNGPs⁶¹ and participated in global fora on BHR and the UNGPs such as the United Nations annual forum on Business and Human Rights in Geneva. They also pushed for the introduction of a NAP. In mid-2015, Komnas HAM and ELSAM released a joint report entitled *The Urgency of Developing the National Action Plan on Business and Human Rights in Indonesia*.⁶² This argued that a NAP was needed in order to “prevent and minimalize the negative impacts of business operations towards the human rights and environment,” “make corporation as one of the actors responsible for development process in Indonesia,” and provide a guide as to “which regulations should be developed and which should be adapted through the corporates’ responsibilities towards respecting, protecting, and giving access to remedy of the human rights.”⁶³ In mid-2017, the two organizations followed up by publishing a “policy paper” on Business and Human Rights that included a full draft of a proposed NAP.⁶⁴ In the wake of this, Komnas HAM sought to persuade the central government to issue a high-level regulation such as

a Government Regulation or Presidential Regulation to give the NAP a stronger legal foundation and make its provisions binding on business and government.

Running alongside and in conjunction with this campaign, business representative organizations such as the Indonesian Business Council for Sustainable Development (IBCSO), the Indonesian Employers Association (APINDO), and the Indonesian Chamber of Commerce (KADIN) along with the Indonesian Global Compact Network (IGCN)—a multi-stakeholder group comprising businesses, universities, and NGOs committed to promoting the United Nations Global Compact—actively engaged in and, to some extent, sought to lead discussions about the implementation of the UNGPs in Indonesia. In many cases, they work with Komnas HAM and human rights NGOs on joint activities or events. In 2014, for instance, IGCN and ELSAM published a translation of *How to do Business With Respect for Human Rights*, a report on BHR prepared by the Netherlands arm of the Global Compact Network⁶⁵ while IBSCD and ICCO Cooperation, an international NGO that has been active in the BHR field, sponsored a conference on BHR in Indonesia, the aim of which was to discuss the implementation of the UNGPs in Indonesia and the South East Asia region.⁶⁶ Similarly, in 2016, the IGCN and ELSAM established the Business & Human Rights Working Group (BHRWG), a body that included individuals from the corporate sector, NGO representatives and academics, to act as a forum for dialogue between business and civil society. ELSAM and KADIN have collaborated to hold multi-stakeholder discussion forums on the UNGPs.⁶⁷

The effect of these initiatives was to build an active and broad collaborative learning network around issues of BHR and the UNGPs at the national level in Indonesia spanning government, business, and NGOs. It is unclear whether this network extended to the local level in Indonesia where much corporate activity is situated and government approvals and monitoring

of corporate activity take place given Indonesia's decentralised system of government, although this seems unlikely because of the relative weakness of Komnas HAM and civil society at the local level.⁶⁸ Nevertheless, to the extent that the Indonesian government and business have failed to make much progress vis-à-vis UNGP implementation, this cannot be explained in terms of the absence or weakness of a collaborative learning network for BHR/UNGPs at the national level.

In our view, a more persuasive explanation of the limited nature of UNGP implementation lies in consideration of issues to do with power relations and processes of conflict and contestation. The point here is threefold. First, the predatory political, bureaucratic, and corporate elites who dominate the country's political system and control the country's main domestic business conglomerates and State-Owned Enterprises (SOEs)⁶⁹ have had little interest in improved protection of human rights or have preferred to address human rights concerns through voluntary CSR measures. Exercising enormous influence over all arms of government—the legislature, the bureaucracy, and the judiciary—as well as the business representative organizations mentioned above, they have also had the political clout to stymie calls for far-reaching change.⁷⁰ These actors have had significant business interests in sectors prone to human rights abuses, particularly mining, palm oil, and forestry.⁷¹ At the same time, some of their businesses have sold their products into markets where state regulations or consumer preferences dictate that companies should comply with international human rights norms. But their exposure to human rights-related business risks has been ameliorated to the extent that many of their businesses have primarily not sold their products into such markets.⁷² To the extent that these actors have been exposed to human rights-related business risks, they have balked at supporting options for UNGP implementation that involve new government regulations or the development of enforcement capabilities, preferring instead to focus on meeting existing legal obligations and

voluntary actions that businesses can take in accordance with a voluntarist model of CSR. For instance, the viewpoints expressed by business representative associations have tended to privilege a CSR-based approach to UNGP implementation over a regulatory one.⁷³

Second, there has been little support for UNGP implementation from technocratic elements in the central government and officials at organizations such as the World Bank and the IMF. These figures have not so far commented publicly on the UNGPs. But their preference for simplified regulation has biased them towards support for a CSR-based approach and away from a more regulatory approach, as became evident in earlier policy discussions surrounding CSR.⁷⁴ At the same time, like predatory elites, they have been able to exercise significant influence over the state's response to the UNGPs by virtue of their occupancy of key parts of the state apparatus and the fact that the liberal economic policies they espouse have historically aligned with the interests of mobile capital controllers, and generated capital inflows.⁷⁵ Within this group, President Joko Widodo has arguably been the key figure. Described by some as a "technocratic populist,"⁷⁶ Widodo has made simplifying investment procedures a key priority of his administration, introducing a raft of reforms that have seen the country's ranking in the World Bank's "Ease of Doing Business" index improve from 120th place in 2014 to seventy-third place in 2020, even if these reforms have been accompanied by growing economic nationalism and a shift towards greater regulation in many sectors.⁷⁷ According to Ahsinin et al.,⁷⁸ he and other senior officials objected to the development of a NAP on the grounds that it could constitute a constraint on business investment. Instead, they insisted that human rights-related policies should be integrated into the HR-NAP, so as to avoid the existence of multiple NAPs on different issues.⁷⁹

Third, and finally, Komnas HAM and its NGO allies have lacked significant leverage

over the state and Indonesia's business community. Members of this coalition have exercised some influence over public affairs in recent years through their ability to influence media reporting on key issues, access new and reformed judicial institutions, and to some extent penetrate the political parties and the national parliament.⁸⁰ They have also been able on some occasions to leverage support from influential foreign donors and international organizations seeking to promote human rights in the country who have had a degree of structural leverage due to their control of aid monies. With regards to implementation of the UNGPs specifically, they have also been able to leverage Komnas HAM's legislative authority to make recommendations to government on human rights issues, and, as we will see below, government figures have on rare occasions invited them to participate in BHR-related decision-making processes within particular parts of the government. Finally, they have had an institutionalized presence in the governance of voluntary certification schemes such as the RSPO. But, in general, they have had little scope to influence state and business decision-making regarding the UNGPs because of their subordinate presence within Indonesia's parties and parliament, the limited presence of NGO figures in the cabinet and bureaucracy, their exclusion from business representative organizations such as KADIN and APINDO, their lack of structural leverage over the state, and their inability to mobilize large numbers of people in support of their cause.⁸¹ Except on rare occasions, they have been limited to seeking promotion of change from the outside and from a position of weakness.

2. Exceptions and Forms of Implementation

The few significant actions that have been taken vis-à-vis UNGP implementation—specifically,

the MMAF's issuance of a set of regulations providing for the introduction of a mandatory human rights certification scheme and the revisions to the RSPO—and the forms of implementation that have occurred in each case, are also better explained in terms of power relations and processes of contestation than factors related to socialization and learning. In the case of the palm oil sector, multi-stakeholder networks have developed within the RSPO since it was established in 2003 generating conducive conditions for the positive reception of the UNGPs as an authoritative reference point. Broad acceptance amongst both business and civil society RSPO members of the legitimacy of these global standards enabled the UNGPs to serve as a template that could then be incorporated into the RSPO's internal policies and procedures with little active resistance from corporate participants of the RSPO. Nonetheless, the proposition within Ruggie's constructivist account of learning that such processes of socialization and learning tend towards a cumulative process of ratcheting up over time cannot adequately explain the persistent limits to the reach of these learning networks and their influence.

The notable processes of UNGP implementation documented above have largely been promoted by major palm oil companies with powerful market-based incentives to engage with international regulatory agendas. Those palm oil companies with high exposure to western markets (particularly in the EU), such as Sinar Mas, GAR or Wilmar, were subject to strong market pressure exerted by powerful investors and buyers in palm oil supply chains. Within these European markets, there was a long history of civil society campaigning on forest conservation and human rights issues in the palm oil sector, and strong links to coalitions of CSOs operating in Indonesia.⁸² NGO pressure on western banks and financial institutions, food retailers, and large processing and trading companies, in turn enabled these actors to exercise structural market power as large buyers to pressure palm oil growers and traders to adopt similar

commitments, as means of sustaining access to European markets for their products.⁸³

Meanwhile, such agendas supportive of UNGP implementation have remained stubbornly constrained within the boundaries of these narrow networks of sectoral actors. While the European market is an important export destination, and Unilever was reported in 2010 to be the world's single largest buyer,⁸⁴ Indonesia's largest export market for palm oil is now India.⁸⁵ Indonesia is also a significant consumer of its own product.⁸⁶ Moreover, while European banks have historically backed the sector, more recently Islamic banks in the Middle East, and financiers from India and China have gained influence.⁸⁷ The persistent disconnect between UNGP implementation amongst internationally exposed companies, and those linked predominantly into domestic and regional markets, weakens support for a primarily socialization-based account of UNGP implementation. In some tension with a constructivist account, the partial implementation that has occurred appears to have been driven centrally by configurations of power and interest within the international political economy of palm oil supply chains, rather than as a result of dialogue and learning within collaborative learning networks.

In the case of the fisheries sector, longstanding multi-stakeholder networks that could act as a mechanism for socialization and learning such as those developed within the RSPO simply did not exist. On the one hand, this reflected the fact that struggles over human rights abuses in Indonesia's fishing industry emerged relatively recently compared to the palm oil sector. The fisheries industry in Southeast Asia only became a focus of concern for human rights activists when journalists at The Guardian newspaper revealed in June 2014 that Thai fishing companies were using slave migrant labor in their offshore fishing activities and linked these practices to European markets.⁸⁸ In March 2015, journalists at Associated Press then published a report in

which it claimed that “hundreds” of men were being held by fishing companies in Benjina, a small island in Indonesia’s Maluku province.⁸⁹ Its investigation was brought to the attention of Indonesian law enforcement bodies, who found that in fact more than 1,300 fishermen from Myanmar, Cambodia, Thailand and Lao were enslaved by local fishing companies. They had been trafficked to Indonesia from their home countries and forced to work over twenty hours a day in brutal working conditions.⁹⁰ A flurry of international media reports condemning Indonesia followed as did domestic reporting on the issue. On the other hand, the absence of comparable multi-stakeholder networks also reflected the fact that voluntary industry-based certification schemes such as the Maritime Stewardship Council (MSC) were not well established in Indonesia. Indeed, it was only in the wake of the Benjina crisis that the first Indonesian fisheries companies started seeking MSC certification.⁹¹

Rather than processes of socialization and learning through multi-stakeholder networks, the government’s introduction of a mandatory human rights certification scheme was driven primarily by two factors. The first was the fact that the media reporting on the Benjina case generated market pressure on the Indonesian state to address the industry’s human rights problems. The international attention generated by the case raised the possibility that Indonesia’s fisheries exports would fall and even be banned by some countries.⁹² In particular, MMAF officials became concerned that exports to European and American markets were at risk if Indonesian companies did not have human rights certifications in place.⁹³ Reflecting these concerns, Pudjiastuti stated publicly in April 2015 that: “foreign interest has been extraordinary in the Benjina case. Therefore, the parties involved must be serious in resolving this issue so it does not tarnish Indonesia’s name internationally.”⁹⁴

The second factor relates to the nature of political leadership within the sector and

specifically the potential for political leaders to act as change agents. Whereas the Minister of Agriculture, Amran Sulaiman, had responded with nationalist rhetoric in the face of threats by the EU to ban Indonesian palm oil in 2017,⁹⁵ Pudjiastuti actively endorsed concerns about human rights abuses in the fishing industry, asking Komnas HAM to conduct an investigation into the Benjina case, a rare move for a government minister.⁹⁶ Moreover, she appointed Mas Achmad Santosa, a leading figure in Indonesia's human rights and environmental movements, to head a new Task Force Against Illegal Fishing and invited FIHRRST—in particular, Marzuki Darusman and Makarim Wibisono, two of the organization's founders, the latter of whom had been Indonesia's ambassador to the United Nations between 2004 and 2007 and in this period also chaired the UN Human Rights Council (2005)—to advise her Ministry on human rights issues. The reason for this different response is unclear but likely relates to her bold, populist, style and, in particular, apparent determination to take on vested interests in the fishing industry posing a threat to the industry's sustainability.

In sum, then, to the extent that rights coalitions were able to make headway in promoting UNGP implementation, it came about because they successfully leveraged market forces in their favour, narrowing power asymmetries vis-à-vis predatory and technocratic elites. At the same time, the form of implementation differed markedly between the palm oil and fisheries cases, focusing on revisions to a voluntary certification scheme in the former and the issuance of state regulations in the latter. This reflected on the one hand, the different histories of struggle over BHR issues in the two sectors and the consequent relatively well-established position of the RSPO compared to the MSC. On the other hand, it reflected the extent of high-level political support for change in the two industries: the fact that Pudjiastuti was sympathetic to human rights concerns while Sulaiman was not, created greater scope for a regulatory response in the

fisheries industry than in the palm oil industry.

IV. CONCLUSION

This article has examined the nature and determinants of UNGP implementation in Indonesia. It has argued that UNGP implementation in Indonesia has been limited and that this has reflected the political dominance of politico-business and technocratic elites over rights coalitions rather than problems of socialization and learning, although these processes have been a feature of its implementation process. At the same time, it has shown that rights coalitions have had some modest success in promoting UNGP implementation where they have leveraged market forces and that these successes have taken different forms depending on the history of struggle over business and human rights in the relevant domain and the extent of high-level political support. Where social movement activities have yielded well-established voluntary certification processes, it has been possible for change to occur through revisions to their rules and governance. Where high level political support has been present, regulatory options have been feasible.

To the extent that the Indonesian experience holds lessons for other countries, what does this analysis suggest with regards to strategies for promoting UNGP implementation? As noted earlier, organizations such as the European Parliament's Directorate-General for External Policies⁹⁷ (2016)—drawing on the theory of change underpinning the UNGPs—have recommended that the strategic focus should be building and extending collaborative learning networks related to BHR through awareness-raising activities, capacity building activities, business and human rights events, and technical assistance and training. Alternatively, scholars

such as Melish and Meidinger,⁹⁸ who view power asymmetries rather than problems of socialization and learning as the principal obstacle to UNGP implementation, have recommended increased use of “organized mechanisms of social leverage” such as citizen report cards, social auditing, and certification schemes. This is on the grounds that such technologies can serve to narrow power asymmetries by creating more participatory decision-making processes and enabling rights coalitions to leverage support from more powerful actors by, for instance, linking human rights concerns to concerns on the part of affected businesses to manage business risks to which the former give rise. More generally, reflecting this logic, they have called for the inclusion of a “participation” pillar in the UNGPs alongside “protect,” “respect” and “remedy.”⁹⁹

Broadly speaking, in emphasizing the need to narrow power asymmetries, our analysis provides little support for the approach recommended by the European Parliament’s Directorate-General for External Policies¹⁰⁰ because it is unclear how its recommended activities would serve to reduce these asymmetries. It provides more support for the participatory approach recommended by scholars such as Melish and Meidinger¹⁰¹ because their approach is centrally concerned with this goal.

However, it also points to a need to go beyond attempts to devise and use technologies of participation as a strategy for reducing power asymmetries. The Indonesian experience shows that UNGP implementation in contexts of adverse power relations is a function of the capacity of social movements to confront corporate power in various ways: by monitoring corporate activity, exposing corporate abuses of human rights, advocating for improved protection of and respect for human rights through political mechanisms, forging alliances, and engaging directly in policy-making processes. Attention thus needs to be given to building their capacity in these respects. The development and use of technologies of participation and activities framed as

socialization and learning events may be useful in achieving this outcome in so far as they provide institutional mechanisms through which rights coalitions can confront corporate power. But so many other actions are not envisaged by these approaches, such as increased funding for human rights organizations; the building of coalitions between domestic rights activists, on the one hand, and international NGOs, the media and sympathetic elements in the state, on the other; and enhancement of rights coalitions' capacity to monitor corporate activity and mobilize politically. Our analysis suggests that more emphasis needs to be given to these sorts of actions.

Our analysis also suggests that there are distinct pathways to achieving different forms of UNGP implementation, incorporation into laws and regulations versus incorporation into the rules governing voluntary certification initiatives. This matters to the extent that, as Nolan has argued, soft law initiatives such as the UNGPs tend to be most effective in promoting change when they become binding “to a point where compliance is widespread and consistent.”¹⁰² This can occur when soft law is incorporated into hard law instruments such as laws and regulations, acts as “a precursor to hard law” or becomes “a supplement to a hard-law instrument.”¹⁰³ The fisheries case shows that incorporation of the UNGPs into regulations requires not simply effective confrontation of corporate power by rights coalitions but also support from within key elements in the state. In this respect, it suggests that any strategy for promoting regulatory reform needs to include efforts to build alliances with state officials and take advantage of windows of opportunity provided by the presence of reformist leaders qua change agents, bearing in mind the possibility that such windows may quickly close.

Finally, our analysis suggests that proponents of the UNGPs need to be modest about what they can achieve through the UNGPs regardless of the strategy they employ. Some commentators have trumpeted the UNGPs as a “game-changer,” suggesting that the principles

have had a profound influence on company behavior and policy debate.¹⁰⁴ The article's conclusions cast doubt on such optimistic conclusions. Instead, our findings regarding the fragility of soft law regulatory approaches in the face of resistance from powerful domestic interest groups resonate strongly with critics of the UNGPs who view consensual, soft law initiatives as insufficient means of challenging corporate power.¹⁰⁵ Yet our analysis has also demonstrated that implementation of the UNGPs through state-led, "hard" law regulatory pathways similarly founders when the interests of key local power holders fail to align with global regulatory agendas. The challenge then is not simply how to reconfigure hard versus soft law approaches, but also how to confront the entrenched power imbalances between politico-business and technocratic elites and pro-regulatory rights coalitions that more deeply underpin implementation failures. Our findings in this sense caution against unchecked optimism directed at hard as well as soft law regulatory approaches: as we have seen, any strategy for promoting the UNGPs is liable to run up against severe obstacles where predatory political, bureaucratic and corporate elites are the dominant force as, alas, is the case in many parts of the world.

Endnotes

* *Andrew Rosser* is Professor of Southeast Asian Studies and Deputy Director of the Asia Institute at the University of Melbourne. His research examines the political economy of development in Indonesia, with a focus on matters related to human rights.

** *Kate Macdonald* is an Associate Professor in the School of Social and Political Sciences at the University of Melbourne. Her research examines the politics of transnational production and business, with a particular focus on social, labor and human rights regulation of global business.

*** *Ken M.P. Setiawan* is a Lecturer in Asian and Indonesian Studies at the Asia Institute, The University of Melbourne. Her research examines the politics of human rights in contemporary Indonesia.

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